TAN YIN YEN v. PUBLIC PROSECUTOR

[F.C. — (Suffian Ag. C.J., Gill and Ong Hock Sim F.JJ.) September 3, 1973]

[Kuala Lumpur — Federal Court Criminal Appeal No. 7 of 1973]

Courts of Judicature Act, 1964, s. 66 — Questions of law referred to the Federal Court should be questions that are of public interest.

Criminal Procedure — Reference to Federal Court — Questions of law — Courts of Judicature Act, 1964, s. 66.

In this case the appellant had been convicted and fined by a magistrate for an offence under the Fisheries Act, 1963 and the Fisheries (Maritime) Regulations. Subsequently an order was made by a different magistrate for the forfeiture of his fishing boat and nets. He appealed to the High Court which confirmed the order of confiscation. The learned appellate judge, on the application of the appellant, referred the following question of law to the Federal Court:

> "Whether in the circumstances of this case the magistrate had properly exercised his discretion in making an order of confiscation of the fishing vessel and the net under section 16(1) of the Fisheries Act, No. 8 of 1963?"

At the hearing of the reference the learned Deputy Public Prosecutor agreed that the order of confiscation was a nullity.

Held: questions of law which may be referred to the Federal Court under section 66 should not be questions that are of personal interest only to the accused or to the Public Prosecutor but should be questions that are of public interest. It would be better if the High Court were to exercise their discretion under section 66 of the Courts of Judicature Act sparingly, so that references are not used as an indirect way of appealing against matters that under the law have been finally determined by the High Court.

The following authorities were cited in arguments: *Evans* [1937] 2 All E.R. 646, 650 & 654 and *Ward* v. *James* [1965] 1 All E.R. 563, 570.

FEDERAL COURT.

S. Appaduray for the appellant.

Gunn Chit Tuan (Deputy Public Prosecutor) for respondent.

Suffian Ag. C.J. (delivering oral judgment of the Court): Tan Yin Yen pleaded guilty to a charge under rule 2(1)(b), Fifth Schedule to the Fisheries (Maritime) (Amendment) Regulations, 1971, and section 13(1) of the Fisheries Act No. 8 of 1963, and was convicted and fined. Thereafter an inquiry was held not by the same magistrate who had dealt with him but by another, who ordered his fishing boat and one of his fishing nets forfeited. He appealed and the High Court confirmed the order of confiscation. On his application the learned appellate judge referred to us under section 66 of the Courts of Judicature Act the following question of law:

"whether in the circumstances of this case the magistrate had properly exercised his discretion in making an order of confiscation of [the fishing vessel and the net] under section 16(1) of the Fisheries Act, No. 8 of 1963."

We refrain from answering the question because the learned Deputy Public Prosecutor who appears for the Public Prosecutor says that the order of confiscation was a nullity and undertakes to bring this matter to the relevant authority with a view to the release to Tan Yin Yen of the articles improperly confiscated which it is stated are still with the police.

It is to be observed that questions of law which may be referred to us under section 66 should not be questions that are of personal interest only to the accused or the Public Prosecutor, but should be questions that are of *public* interest, and it seems to us better if the High Court were to exercise their discretion under section 66 sparingly, so that the references are not used as an indirect way of appealing against matters that under the law have been finally determined by the High Court.

The court refrained from answering.

Solicitors: *Ten Chin Yang.*

ISMAN BIN OSMAN v. GOVERNMENT OF MALAYSIA

[O.C.J. — (Sharma J.) September 12, 1973]

[Ipoh — Civil Suit No. 506 of 1968]

Administrative Law — Dismissal of police constable by Chief Police Officer — Right to be heard — Purported delegation of powers of Police Force Commission — Whether Commission has power to delegate its functions in so far as they relate to the dismissal or reduction in rank of public servant — Federal Constitution, arts. 132(2A), 135(1), 140(6)(b) and 144(6).

In this case the plaintiff, a police constable, was dismissed by the Chief Police Officer, Perak. He had been convicted of the offence of permitting his car to be used as a public service vehicle without licence and after his conviction he was informed that his dismissal was contemplated and he was told that if he wished to make any representations he should do so in writing to the Chief Police Officer. The plaintiff sent in a letter asking that he be reemployed but the Chief Police Officer decided to dismiss him. The Chief Police Officer purported to act under the powers given by the Police Force Ordinance. The Police Force Commission had purported to delegate its functions under article 140(1) of the Constitution, to the Chief Police Officer.

Held: (1) the Police Force Commission has no power to delegate its functions in so far as they relate to the dismissal or reduction in rank of a public servant;

(2) the Chief Police Officer was in fact not acting under any delegation of authority by the Police Force Commission when he dismissed the plaintiff;

(3) the dismissal from service of the plaintiff in this case was therefore null and void and inoperative.

Cases referred to:

(1) *B. Surinder Singh Kanda* v. *Government of the Federation of Malaya* [1962] M.L.J. 169.
(2) *Board of Education* v. *Rice* [1911] A.C. 179, 182.
(3) *Ceylon University* v. *Fernando* [1960] 1 W.L.R. 223; [1960] 1 All E.R. 631.
(4) *Re Gregson* (1894) 70 L.T. 106.
(5) *Rex* v. *Bodmin Justices* [1947] K.B. 321.
(6) *Goold* v. *Evans* [1951] 2 T.L.R. 1189.
(7) *Rex* v. *Architects Registration Tribunal* [1945] 2 All E.R. 131.
(8) *King* v. *Tribunal of Appeal under the Housing Act, 1919* [1920] 3 K.B. 334.
(9) *Lachmi Narain Marwari & others* v. *Balmakund Marwari and another* 51 I.A. 321.
(10) *Ruth* v. *Clarke* (1890) 25 Q.B.D. 391, 395.
(11) *Gordon Dadds & Co.* v. *Morris* [1945] 2 All E.R. 616, 621.
(12) *Vine* v. *National Dock Labour Board* [1956] 2 All E.R. 939.
(13) *Baber* v. *Manchester Hospital Board* [1958] 1 All E.R. 322.
(14) *Ridge* v. *Baldwin* [1964] A.C. 41.
(15) *Malloch* v. *Aberdeen Corp.* [1971] 2 All E.R. 1278.
(16) *McCleeland* v. *Northern Ireland General Health Services Board* [1957] 1 W.L.R. 594.
(17) *Rengachari* v. *Secretary of State* (1936-37) 64 I.A. 40, 53.
(18) *Terrell* v. *Secretary of State for the Colonies* [1953] 2 Q.B. 482.

CIVIL SUIT.

G. T. Rajan for the plaintiff.

Abdul Razak bin Dato Abu Samah (Senior Federal Counsel) for the defendant.

Sharma J.: The plaintiff was appointed as a police constable on 1 June 1961 by the Commandant of the Federal Police Depot initially for a period of three years. He, however, remained in the Police Force as a regular police constable upto 19 April 1967. He was then dismissed by the Chief Police Officer, Perak. This order of dismissal was conveyed to him in a letter written by the Chief Police Officer. This letter although written on 11 November 1967 purported to make the dismissal retrospective and effective as from 19 April 1967. Paragraph 2 of this letter (A5) states "... *I* have decided to dismiss you from the Police Service with effect from 19 April 1967 *in accordance with the powers conferred on me as per the 1st Schedule to the Police Ordinance 1952.*" (italics are mine.)

The facts leading to the dismissal of the plaintiff were that he was the registered owner of a car bearing registration No. PA4487. He was charged in the Magistrate's Court, Ipoh under sections 92(ii) and 74(ii) of the Road Traffic Ordinance 1958 in that he had on 12 March 1966 permitted his car to be used as a public service vehicle without having a licence authorising such user and without having obtained a policy of insurance against third party risks. He was convicted on 19 April 1967 on both the charges and fined $1,000. He appealed against that conviction but the appeal was also dismissed on 4 August 1967. Consequent upon his conviction the then Chief Police Officer, Perak wrote to the plaintiff on 22 April 1967 (*i.e.* 3 days after his conviction) that he was being suspended from duty without pay *"under General Orders Cap. D 43 with effect from 19 April 1967."*

Regulation 43 under Chapter D of the General Orders (repealed by P.U.290/68) dealt with suspension of an officer against whom proceedings under Regulation 40 of Chapter D of the Regulations were contemplated. Regulation 40 required the Disciplinary Authority to either go through and consider the evidence against the officer who was convicted on a criminal charge or to consider the report from the Legal Department in respect of those criminal proceedings and *thereafter to form an opinion* whether the officer concerned should be dismissed or dealt with in some other manner. If action was taken under regulation 40, it was not necessary to observe the procedure prescribed under regulations 37 to 39.

On 7 September 1967, the Chief Police Officer, Perak (PW2) wrote to the plaintiff that the dismissal of the plaintiff was "contemplated" because of the convictions on the two charges under the Road Traffic Ordinance and that if he wished to make any representations he should do so *in writing addressed to him* within 24 days of the receipt of the letter by the plaintiff. The plaintiff sent in a letter but PW2 decided to dismiss him. A5 was the letter of dismissal. In this letter PW2 advised the plaintiff that he could appeal to the Commissioner of Police under regulation 15(2) of the Police Regulations 1952, if he so desired. An appeal was made by the plaintiff in writing. At first it was considered as an application for re-employment but the letter A15 from the Inspector-General of Police makes it clear that the plaintiff's letters were treated as an appeal against the decision of PW2. The plaintiff was notified in A15 that the decision of dismissal was final.

The plaintiff has filed this suit for a declaration that his dismissal was void and inoperative and of no effect and that he is still and continues to be a member of the Royal Malaysian Police and as such is entitled to all the salary and emoluments which he would have but for his wrongful dismissal been entitled to.

The defendant denies that the dismissal of the plaintiff was wrongful and asserts that his dismissal was in accordance with law and procedure.

The facts of this case are very brief and simple. It is, however, the law which does not appear to be so easy or straightforward. The plaintiff was a member of the Police Force and as such the conditions of his service were regulated not only by the Police Ordinance 1952 (which remained in force until it was repealed by the Police Act 1967) but also by the provisions of the Constitution. (See article 132(2) of the Constitution). Under article 132(2A) he held office during the pleasure of the Yang di-Pertuan Agong. The power to dismiss at pleasure is however limited by the very opening words of article 132(2A). The English doctrine of tenure of service solely at the pleasure of the Crown thus does not prevail here. The effect of article 135 is to change the pleasure of article 132(2A) into a statutory pleasure and the tenure of service into a statutory tenure. Article 135(1) provides that the plaintiff could not have been dismissed by any authority unless that authority also possessed the power to employ a person equal in rank to the rank possessed by the plaintiff at the time of his dismissal. Article 135(2) further ensures that if the plaintiff was dismissed without being given a reasonable opportunity to be heard such dismissal could be of no effect and would thus be inoperative. The provisions of article 135(2) are superimposed on the provisions of article 135(1). If either of the provisions of article 135 is not observed the order of dismissal is unavailing and of no effect.

A police constable could be appointed under section 9(3) of the 1952 Ordinance by the Commissioner. Part VII of the Police Ordinance 1952 dealt with discipline. Section 45(1) of that Ordinance is important and it will be best to reproduce it. In so far as it is relevant it reads: —

"Any constable who is *found guilty by an officer* authorised in that behalf, *of any offence against discipline*, shall, subject to Police Regulations, be liable to such punishment as is set out in the First Schedule to this Ordinance."

Regulation 4 of the Police Regulations 1952 is to the same effect.

A constable in order to be punished under section 45(1) is to be found guilty of an offence against discipline and this finding arrived at has to be "by an officer *appointed in that behalf*" and by no other authority.

The Commissioner could under section 45(2) authorise a gazetted police officer to exercise the jurisdiction and powers of finding the constable guilty of an offence against discipline. The constable could not be punished except in conformity with the provisions

of the Police Regulations. Under Schedule 1 of the Ordinance, a Commanding Officer could dismiss a constable but only after section 45(1) of the Ordinance had been duly complied with. A Chief Police Officer is included in the definition of a Commanding Officer in the 1952 Ordinance.

31st of August 1957 was the Merdeka Day and the supreme law of the country as from that date could only be the Constitution. Article 140(1) of the Constitution deals with the jurisdiction of the Police Force Commission and its jurisdiction expressly extends to all members of the Police Force and it is the Police Force Commission which from the date of the commencement of the Constitution is responsible, *inter alia*, for the appointment of and disciplinary control over all members of the Police Force. Again under article 144(1) it is the Police Force Commission which has the *duty* to appoint and to exercise disciplinary control over members of the Police Force. (See *B. Surinder Singh Kanda* v. *The Government of the Federation of Malaya.*[1]) The Police Force Commission can delegate any of its functions under article 144(6) "but still it is its own duty and its own power that it delegates." Article 144(6) further makes it mandatory that the board or officer to whom the Police Force Commission delegates its functions should exercise those delegated functions "under the direction and control of the Commission."

As already stated article 135(2) confers upon a member of the public services a constitutional protection that he shall not be dismissed or reduced in rank without being given a reasonable opportunity of being heard. Dealing with the question of reasonable opportunity to be heard Lord Denning while delivering the judgment of the Privy Council in *B. Surinder Singh Kanda* v. *The Government of Malaya*[1] said: —

"The rule against bias is one thing. The right to be heard is another. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it. The Romans put them in the two maxims: *Nemo judex in causa sua*: and *Audi alteram partem.* They have recently been put in the two words Impartiality and Fairness. But they are separate concepts and are governed by separate considerations. In the present case Inspector Kanda complained of a breach of the second. He said that his constitutional right had been infringed. He had been dismissed without being given a reasonable opportunity of being heard.

If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn, L.C. in *Board of Education* v. *Rice*[2] down to the decision of their Lordships' Board in *Ceylon University* v. *Fernando.*[3] It follows, of course, that the judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The court will not enquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough. No one who has lost a case will believe he has been fairly treated if the other side has had access to the judge without his knowing. Instances which were cited to their Lordships were *Re Gregson,*[4] *Rex* v. *Bodmin Justices*[5] and *Goold* v. *Evans,*[6] to which might be added *Rex* v. *Architects Registration Tribunal,*[7] and many others."

Article 135 of our Constitution is in *pari materia* with article 311 of the Indian Constitution. The words "reasonable opportunity of being heard" appear in article 311(2) of the Constitution of India. There are, however, certain provisos to clause (2) of article 311 of the Indian Constitution which if they apply completely take away the force of article 311(2) of that Constitution. The first proviso deals with an employee of the government whose conduct leads to his conviction on a criminal charge. No disciplinary proceedings need be held against him under the Indian Constitution. The rule that there must be conformity with the principles of natural justice does not apply to the case of such an employee there. He becomes liable on conviction to be dismissed without any further proceeding or hearing. *There is no proviso to article 135(2) of our Constitution* with the result that here the constitutional guarantee of having a reasonable opportunity of being heard before being dismissed or reduced in rank remains in tact and undisturbed for the benefit of all members of the services referred to in paragraphs (b) to (h) of article 132 of the Constitution.

The law governing the relationship between an employee and an employer normally applies equally to the case of an employee whose employer happens to be the government. There are added safeguards provided under the Constitution for members of the various services. When an order of dismissal passed against a public servant is challenged by him in the High Court it is for the High Court to consider whether the constitutional requirements of article 135(1) and (2) have been satisfied or not. In such a case it cannot be contended that the infirmities on which the public servant relies flow from the exercise of discretion vested in the enquiry officer. The enquiry officer may have acted *bona fide* but that does not mean that the discretionary orders passed by him are final and conclusive. The enquiry officer is required to observe rules of natural justice. The reasonable opportunity envisaged in article 135(2) includes: —

(a) an opportunity to deny his guilt and establish his innocence which he can only do if he is told what the charges levelled against him are and the allegations on which such charges are based;

(b) an opportunity to defend himself by refuting the evidence proposed to be considered against him and if necessary (depending on the circumstances) to cross-examine the witnesses produced against him and leading evidence in support of his defence; and

(c) an opportunity to make his representation as to why the proposed punishment should not be inflicted on him.

In my view the letter A2 notified the plaintiff of all the facts and evidence which PW2 was going to take into consideration. He was given an opportunity to make any representations to PW2 which he wished to. The plaintiff had heard all the evidence in the Magistrate's Court. He had then cross-examined all the prosecution witnesses. He had also appeared as his own witness. He was convicted and had appealed against his conviction. This appeal was dismissed. In his representation (A3) to PW2 he did not deny the truth of the evidence produced against him in the Magistrate's Court. In fact in A3 he was asking to be re-employed in the Police Force. In the circum-

stances in my opinion there was no denial to the plaintiff of a reasonable opportunity to be heard. An enquiry officer is not bound by the strict rules of the law of evidence. In the absence of any expressed desire on the part of the plaintiff to take part in the proceedings and to reopen the case all over again before PW2, it was quite competent for PW2 to proceed on the material which was already before him and of which the plaintiff was fully aware. (See *The King* v. *Tribunal of Appeal under the Housing Act, 1919.*[8])

There, however, remains the question whether PW2 in dismissing the plaintiff had acted properly and not in violation of article 135(1). The only competent authority to dismiss the plaintiff was the Police Force Commission. That this is so is evident from a plain reading of article 140(1) of the Constitution. Article 140(6)(b) however authorises "the several members of the Commission" to delegate its "duties and responsibilities" to either a member of the Commission *or a member of the police force* or a board of police officers. The duties, powers and responsibilities could thus validly be delegated *by the Commission* to the Chief Police Officer, Perak. One or more members of the Commission could delegate their respective powers and duties to, say for instance, the Chief Police Officer. The Police Force Commission could, in respect of the matters expressly stated in clauses (a) to (e) of article 140(6) of the Constitution, *regulate* its *procedure* in such a manner as it thought fit. On 9 April 1962 by an instrument marked Exhibit D3 in this court, the Police Force Commission purported to delegate its "*functions*" under article 140(1) of the Constitution. Article 140(1) of the Constitution refers not only to the "jurisdiction" *i.e.* the sphere within which the Police Force Commission is competent to act but also to its responsibilities. The "functions" of the various services commissions are defined in article 144(1). The concept of jurisdiction is distinct from the concept of power or function. It is illustrated, for instance, in the Courts of Judicature Act 1964 where sections 23 and 24 deal with the *jurisdiction* of the High Court and section 25 with the *powers* in the exercise of that jurisdiction. By jurisdiction is meant the authority which a tribunal, court, body, or commission has to take cognizance of in respect of matters presented to it in a formal way for its decision. A court may have jurisdiction to entertain a suit or appeal and yet it may have no power to pass a particular order in that suit or appeal. (See *Lachmi Narain Marwari and Others* v. *Balmakund Marwari and Another.*[9]) Article 140(1) confers jurisdiction and powers on the Police Force Commission. Article 144(1) and (2) also defines the functions and powers of the Commission.

According to DW1, the number of members constituting the Police Force Commission when Exhibit D3 was issued was eight. Exhibit D3 is, however, signed by only six out of those eight members. It was urged that if it were a delegation of the powers and duties of the Commission under article 140(6)(b) it should have been a delegation of powers and duties either by all the members of the Commission or some evidence should have been produced that under article 140(6)(a) the Commission had already prescribed its own procedure and the delegation by six only of the members was valid or sufficient for the purposes of article 140(6)(b). The Police Force Commission is authorised to "provide for" the matters referred to in sub-clauses (a) to (e) of article 140(6). The words "provide for" appearing in article 140(6), in my view, mean "prescribe procedure for or lay down the manner in which" the matters referred to in clauses (a) to (e) of that sub-clause are to be dealt with by the Police Force Commission. One provides for one's old age. A country provides for its defence. It amounts to taking measures to meet a possible event. It is something done to meet a situation which might arise or which has arisen. The words imply a measure of foresight to meet a future situation or a situation which has already arisen. Exhibit D3 was issued on the 9th of April 1962. The plaintiff was not convicted until the 19th of April 1967. The procedure prescribed under Exhibit D3 was consequently laid down to meet the future requirements and duties of the Commission. Article 140(6)(b) refers to "the duties and responsibilities *of the several members of the Commission.*" The argument is that the delegation in order to be valid should have been by all the eight members. The duty to exercise disciplinary control over members of the police force rests with the Commission and not with some of its members only unless there is a proper delegation of its functions to one or more of the members of the Commission. (See article 140(1) and (6) and article 144(1).) It was submitted that may be the Commission acted by a majority. If it were so some evidence should have been produced by the defendant that under article 140(6)(a), the Commission had resolved that in so far as delegation of its duties and responsibilities was concerned such delegation by six of its members was to be as effective and binding as a delegation by all its members. The simple answer to that argument of the plaintiff is to be found in section 41 of the Interpretation and General Clauses Ordinance 1948. The word "delegation" does not imply a total giving up of authority or power. It only means conferment of authority to do things which otherwise the Commission itself would have to do. (See *Huth* v. *Clarke*[10] and *Gordon, Dadds & Co.*, v. *Morris.*[11]) The members of the Commission by delegating their powers to the Chief Police Officer did not denude themselves of the powers enjoined upon them under the Constitution. Exhibit D3 does not on the face of it profess to be a delegation of functions under article 144(6) of the Constitution and no attempt has been made to prove what was the procedure prescribed by the Commission under article 140(6).

It is not necessary for me, in the circumstances of this case, to go into the question whether Exhibit D3 issued in 1962 still remained binding and operative on those members of the Police Force Commission in 1967 who were not its members in 1962. There is no evidence before me to show who the members of the Commission were at the relevant time in 1967. The delegation (Exhibit D3) was valid in 1962. Section 30(1) of the Interpretation Act 1967 kept the validity of Exhibit D3 alive and operative irrespective of any changes in the constitution of the Police Force Commission.

The plaintiff having been found guilty of offences under sections 74(ii) and 92(ii) of the Road Traffic

Ordinance 1958 it is apparent that his conduct in operating a pirate taxi while employed as a detective police constable was an act subversive of discipline. The term "discipline" denotes the order which is meant to be maintained among a certain class of persons, *e.g.* school children, or members of the police or armed forces. If it transpires in a service such as the police force that the policeman himself turns a thief the very foundation and object of the establishment of the police force is overthrown and ruined. As a detective police constable the plaintiff was required to detect crime, not to become a criminal himself. It appears rather incongruous that persons who are themselves in the habit of committing offences should be allowed to remain in the Police Force when one of the obvious objects of their employment is to apprehend and bring to book all those who commit an offence. There are rules which govern the conduct of police officers and other public servants. Those rules are aimed at maintaining discipline and efficiency in the public services. Apart from those rules an employee can be dismissed even in the private sector under one or more of the following conditions: —

(a) if his act or conduct is prejudicial or likely to be prejudicial to the interests or the reputation of the master;
(b) if his act or conduct is inconsistent or incompatible with the due or peaceful discharge of his duty to his employer;
(c) if he makes it unsafe for the employer to retain him in service;
(d) if his act or conduct is so grossly immoral that all reasonable men will say that the employee cannot be trusted;
(e) if his act or conduct is such that the master cannot rely on the faithfulness of the employee.

If a member of the Police Force is found drunk and behaving in a disorderly manner or is found gambling in a public place and is subsequently charged and convicted he is not fit to be kept in the force and should have nothing to complain if he is dismissed *provided* the provisions of Part X of the Constitution are duly observed. Police Regulations or the General Orders may provide for the dismissal of a public servant on conviction for an offence. The question whether such a conviction was only in respect of a technical offence or a serious offence or it involved no moral turpitude is not a question for the court. The facts might constitute a hard case but that does not justify the court to add words to a statute or rules made thereunder. I am not suggesting that the plaintiff was not a knave or a wrong-doer. The plaintiff in this case has certain rights guaranteed to him under the Constitution. In the case of *B. Surinder Singh Kanda* v. *The Government of the Federation of Malaya*[1] Rigby J. who originally tried the suit is said to have found in the Report of the Board of Inquiry that Inspector Kanda was "an unscrupulous scoundrel who had suborned witnesses, both police and civil, to commit perjury" yet the Privy Council thought it the duty of the court to safeguard and preserve intact the rights guaranteed to him under the Constitution. I have consequently, for the purposes of this suit, to be guided by no other considerations except the due observance by the defendant of the provisions of our Constitution.

The courts keep the State within the limits of its statutory powers. When the State dismisses an employee in violation of the mandatory procedural requirements or on grounds which are not sanctioned or supported by statute the courts may exercise jurisdiction to declare the act of dismissal to be a nullity. Such an implication in the case of public employment is thus distinguishable from and in contrast with the incidents of service in private employment *i.e.* in pure cases of master and servant. (See *Vine* v. *National Dock Labour Board*,[12] *Barber* v. *Manchester Hospital Board*,[13] *Ridge* v. *Baldwin*,[14] *Malloch* v. *Aberdeen Corp.*,[15] and *McCleeland* v. *Northern Ireland General Health Services Board*.[16])

Clauses (1) and (2) of article 135 and clause (2) of article 132 of the Constitution provide constitutional limitations upon the right of the Yang di-Pertuan Agong to dismiss members of the various services at his will. These provisions of the Constitution are designed to confer security of tenure upon public servants. The argument that a government servant can neither recover arrears of pay nor damages on the ground that conferment of the benefit of pay for service rendered to the Crown is a matter of bounty and grace for the Crown, that it is not a matter of right of the public servant and that the Crown can never be made liable for damages in tort cannot in view of the provisions of the Constitution hold good. The prerogative right of the Crown to dismiss its servants at will is exercisable only subject to the limitations contained in the Constitution. It thus follows that if any of those limitations are contravened the aggrieved public servant gets a right to maintain an action against the Crown for appropriate relief. The conditions of service are regulated by Federal law or the State law. (See article 132(2) of the Constitution.) The rule of English law that a civil servant cannot maintain a suit against the State or against the Crown for recovery of arrears of salary therefore does not prevail here in view of the specific provisions of our Constitution. (Compare *Ridge* v. *Baldwin*.[14])

The order of suspension made against a government servant lapses on the order of dismissal being made. The order of dismissal then takes its place. When the court declares the order of dismissal illegal, neither the order of suspension nor the order of dismissal remain operative. The contention that if the order of dismissal is legal it cannot be made retrospective as from the date of suspension can have no substance because if a government servant is suspended pending an inquiry into certain charges and if at the end of such inquiry an order of dismissal is made this order replaces the order of suspension. The order of suspension is no doubt replaced but by virtue of the operation of General Orders the government servant does not remain entitled to any salary as from the date of suspension. Ordinarily under Cap. D43 of the General Orders (now repealed by P.U.290 of 1968) an officer convicted on a criminal charge can be suspended and under regulation 35 of the same Cap. D of the General Orders the disciplinary authority can dismiss him. The dismissal consequently dates back to the order of suspension. Regulations 29 to 49, however, did not apply to the plaintiff. (See regulation 28 of Cap. D). In the circumstances it was only

regulation 8 of the Police Regulations 1952 which was applicable and the dismissal of the plaintiff could only be as from 11 November 1967. Order 12 of the Standing Orders (Exhibit D2) therefore seems *ultra vires* regulation 28 of Cap. D of the General Orders.

The opening words of article 132(2) are "Except as otherwise expressly provided by the Constitution...." The conditions of service of a person in the category of the plaintiff are regulated firstly by the Constitution, then by the Police Ordinance or Act, and the Rules, Regulations and Standing Orders made under the said legislation and lastly by the General Orders issued under the authority of the Yang di-Pertuan Agong in accordance with article 132(2) of the Constitution. As far as the question of dismissal of the plaintiff is concerned it is a matter for which the Police Force Commission has been expressly made responsible under the provisions of articles 140(1) and 144(1) of the Constitution. The use of the expression of "exercise of disciplinary control" in the said articles make it clear. Control is useless if it is not accompanied by disciplinary powers. Punishment for offences against discipline was prescribed under section 45 of the Police Ordinance 1952 and regulation 2 of the Police Regulations 1952 enumerates the various offences designated as offences against dismissal. The conduct of the plaintiff in plying a pirate taxi could well fall under regulations 2(61) and (65) of the Police Regulations 1952. Section 74 of the Police Act 1967 similarly deals with the regulations made by the Yang di-Pertuan Agong under article 132(2) of the Constitution or those regulations which are made under section 96 of the Act. The issue of Standing Orders is provided for in section 97 of the 1967 Act. As from the date of the coming into force of the Constitution the power of dismissal of a police officer fell within the exclusive purview of the Police Force Commission. The Police Force Commission under article 144(6) is authorised to delegate its functions to say the Chief Police Officer but those functions have still to be exercised by the Chief Police Officer "under the direction and control of the Commission." In this particular case the direction by the Commission to the Chief Police Officer as evidenced by Exhibit D3 (granting that it was a delegation under article 144(6)) was clear and unmistakable. He was to exercise the functions as prescribed and "specified in the Police Ordinance 1952, and in the rules, regulations and standing orders made or purporting to have been made thereunder." He was not required to act under Cap. D of the General Orders but section 22 of the Police Ordinance 1952 itself made the General Orders applicable to the delegation under Exhibit D3. He was required under article 144(6) of the Constitution to act under the direction and control of the Commission alone in so far as the question of plaintiff's dismissal from service was concerned. The Chief Police Officer (PW2) in fact was truly and unreservedly candid and frank when he said that in dismissing the plaintiff (see A5) he was acting under section 45 of the Police Ordinance 1952 and regulation 2(a) (64) of the Police Regulations 1952 and that he was not acting under the delegation of authority from the Police Force Commission but only in exercise of his powers under the Police Ordinance 1952. It was only under pressurised and somewhat suggestive cross-examination that he said that in writing A1 he was acting under Order 43 of Cap. D of the General Orders. A1 in fact was written not by him but by his predecessor. Exhibit D2 reproduces a part of the Standing Orders relevant to this suit and which were issued under section 82 of the Police Ordinance. PW2 was certainly authorised by the Commission to act in accordance with the Standing Orders. Standing Orders 7, 9 and 12 reproduced in Exhibit D2 are important. The action taken by PW2 against the plaintiff *seems* thus fully covered by the provisions contained in Exhibit D2 and Exhibit D3 and *apparently looks* unchallengeable so far as due observance of the provisions of the Police Ordinance 1952 and the rules, regulations and standing orders made thereunder is concerned. When one exercises a power delegated to him by another there has to be a conscious awareness not only of the existence of that power but also of the fact that the power is being exercised on behalf and for the person who has delegated that power. It should not happen merely by chance or coincidence that the person purporting to act on behalf of himself alone under a particular law or authority is in fact at that time also invested with the power or authority from another under another law and thus becomes competent to act although in reality while acting he is not aware that he is clothed with that authority and is competent only to act under it and by virtue of it alone. The question is was PW2 at the time of taking action, alive to the power under which alone he could be competent to act. I am satisfied that PW2 when dismissing the plaintiff did so purely on his own and by virtue of the provisions of the Police Ordinance 1952 without any knowledge or consciousness of the requirements of the Constitution, the rights of the plaintiff thereunder, or any delegation to him of the functions of the Police Force Commission. The plaintiff had a right to know that the purported order of dismissal was by or on behalf of the only authority competent under the Constitution to dismiss him. Also direction and control by the Police Force Commission over the order of dismissal by PW2 should have continued.

Another important question arises in this case and that is whether the Police Force Commission can validly delegate its powers of dismissal under article 144(6) and article 140(6) (b) of the Constitution inspite of the provisions of article 135(1). The power of dismissal belongs to the master. It cannot be delegated. The matter came up for consideration before their Lordships of the Privy Council in the case of *Rangachari* v. *The Secretary of State*[17] and it was held that the power could not be delegated. Their Lordships observed:

"There is, however, another point raised, and in the courts below decided adversely to the plaintiff, which has given their Lordships considerable anxiety. Section 96B, contains the following proviso: 'But no person in that service (the Civil Service of the Crown) may be dismissed by any authority subordinate to that by which he was appointed.' The purported dismissal of the appellant on February 28, 1928, emanated from an official lower in rank than the Inspector-General who appointed the appellant to his office. The courts below held that the power of dismissal was in fact delegated, and was lawfully delegated, to the person who purported to exercise it. Counsel for the respondent candidly expressed a doubt as to the possibility of maintaining this view, and indeed it is manifest that if power to delegate this power could be taken under rules it would wipe out a proviso and destroy a protection contained not in rules but in the section itself. Their Lordships are clearly of opinion that

the dismissal purporting to be thus ordered in February was by reason of its origin bad and inoperative."

Article 135(1) does not speak of the dismissing authority but it only says that no public servant shall be dismissed or reduced in rank by any authority subordinate to that by which he was appointed, which means that by virtue of article 135(1) the appointing authority gets the power of dismissal. The jurisdiction and the power of appointment are conferred by articles 140(1) and 144(1). That power by itself implies the power of dismissal or taking disciplinary proceedings.

Delegation is always upon an inferior person. During the British rule even the judges in the Colonies held office at the pleasure of the Crown. (See *Terrel* v. *Secretary of State for the Colonies.*[18]) Under the Constitution the government servants hold office during the pleasure of the Yang di-Pertuan Agong. The pleasure recognised by article 132(2A) is, however, restricted by article 135.

Section 29 of the Interpretation and General Clauses Ordinance 1948 is made expressly applicable to the interpretation of the Constitution by virtue of article 160(1). Section 29 of the Interpretation and General Clauses Ordinance 1948 (now section 47 of the Interpretation and General Clauses Act 1967) is a codification of the well understood rule that the power to terminate flows naturally and as a necessary sequence from the power to create. It is a necessary adjunct of the power of appointment and is exercised as an incident to or consequence of that power. Article 135(1) makes it mandatory that as far as dismissal or reduction in rank of a government servant is concerned it cannot validly be done by an authority which is subordinate to the authority which could have made the appointment at the time of the dismissal. Articles 140(6) (b) and 144(6) afford to the Commission a means of *convenience* in its work, to ease its burden as it were. Article 135, however, secures to the servant concerned a constitutional guarantee that he shall not be dismissed by any subordinate authority. It thus appears that there is capacity for some conflict between the provisions of article 144(6) and the provisions of article 135(1) should the Commission decide to delegate its powers of dismissal to some other person or authority. The conflict thus becomes a conflict between the convenience of the Commission and the constitutional rights guaranteed to the public servant. In the event of such a conflict I think it is the duty of the court to keep preserved the constitutional guarantees enshrined in the Constitution for the benefit of the government servant and the security of his tenure. The conflict between the provisions of the two articles can, however, be reconciled if it is held the Commission has no power to delegate its functions in so far as they relate to the dismissal or reduction in rank of the public servant and I do so hold.

Having held that the Police Force Commission had no valid powers to delegate its authority to the Chief Police Officer in so far as such delegation related to the dismissal or reduction in rank of police personnel and having found that in dismissing the plaintiff PW2 was in fact not acting under any delegation of authority by the Police Force Commission, there will be a declaration in favour of the plaintiff that his dismissal from service was null and void, inoperative and of no effect and that he still continues to be a member of the Royal Malaysian Police Force and that he is entitled to all the arrears of salary as from the date of his purported dismissal, i.e. 19 April 1967. There will also be an order that the defendant do pay the costs of this suit to the plaintiff.

Order accordingly.

Solicitors: *G. T. Rajan & Co.*

MAHAN SINGH v. GOVERNMENT OF MALAYSIA

[O.C.J. (Sharman J.) September 20, 1973]
[Ipoh — Civil Suit No. 296 of 1972]

Practice and Procedure — Application for amendment of statement of claim — Whether leave should be granted — No prejudice to the other side.

In this case in the course of the hearing of the suit the plaintiff applied to amend the statement of claim. The learned Senior Federal Counsel for the defendant objected to the application.

Held: in the circumstances of the case the application to amend should be allowed on payment of costs. The case revolved on the determination of pure questions of law and there could be no prejudice whatsoever to the defendant.

Cases referred to:-

(1) *Tildesley* v. *Harper* 10 Ch. D. 386, 397.
(2) *Clarapede & Co.* v. *Commercial Union Association* 32 W.R. 263.

CIVIL SUIT.

M. Sivalingam for the plaintiff.

Abdul Razak bin Dato Abu Samah (Senior Federal Counsel) and *Lim Beng Choon* (Senior Federal Counsel) for the defendant.

Sharma J.: This is the third day of the hearing of this suit. The whole suit revolves on pure and important questions of law, mostly of constitutional law. The parties had agreed upon facts and it was further agreed that on the basis of those facts alone and some evidence which had already been led before those facts were agreed upon the court should proceed to consider and determine the rights of the parties. The material evidence in this case is all documentary which forms part of agreed bundles 'A' and 'B'.

The learned counsel for the plaintiff has in order to meet an objection raised by the learned Senior Federal Counsel made an application for amendment of the statement of claim by adding paragraph 4(a) thereto. The proposed amendment reads: —

"The plaintiff contends that regulation 44 of the Public Officers (Conduct and Discipline) (General Orders) Regulations 1969 is null and void and ultra vires the provisions of Ordinance No. 1 of 1969 and Article 150 of the Constitution."

The learned Senior Federal Counsel has objected to the amendment on the following grounds:

(a) It is not a *bona fide* application because the plaintiff had sufficient notice that in terminating the services of the plaintiff, the Government was acting under Reg. 44 and that if this regulation was sought to be challenged a plea to that effect should have been taken in the very first instance;